

THOMAS L. MURPHY
POST OFFICE BOX 97
SACATON, ARIZONA 85247
(520) 562-9760
E-MAIL: THOMAS.MURPHY@GRIC.NSN.US

May 19, 2009

SUBMITTED ELECTRONICALLY

Hon. Ruth V. McGregor
Chief Justice, Supreme Court of Arizona
1501 West Washington Street
Phoenix, Arizona 85007

Re: Supreme Court No. R-08-0016

Dear Chief Justice McGregor:

I am submitting these comments in support of R-08-0016, a Petition to Amend Rule 35(b) of the Arizona Rules of the Supreme Court, to add Indian law as a subject on the bar examination. While I am currently employed as Senior Counsel for the Gila River Indian Community, the comments contained in this letter are my own and are not from any talking points, but my personal experiences as an attorney practicing in New Mexico and Arizona.

Prior to my current position, I was a private civil practitioner in New Mexico for several years. I am licensed to practice law in New Mexico, Arizona, the Navajo Nation, the Ninth Circuit, the Tenth Circuit and federal courts in New Mexico and Arizona. I have argued cases before the Ninth Circuit, Tenth Circuit, the Supreme Court of New Mexico, the Supreme Court of the Navajo Nation and the Gila River Indian Community Court of Appeals. For two years, I operated an Internet weblog which provided summaries of cases decided by the Navajo Supreme Court and other significant Indian law cases. I have also done some writing, most recently an article on judicial activism in the *Utah Bar Journal* in 2008.

In dealing with attorneys on issues which involve federal Indian law, I often assess their knowledge based upon answers to two simple questions: First, does the United States Constitution apply to Indian tribes? In *Talton v. Mayes*, 163 U.S. 376 (1896), the Supreme Court of the United States held that it did not. One reason the Indian Civil Rights Act of 1968 was enacted is because those guarantees do not otherwise apply to Indian tribes. Second, does state law apply on Indian reservations? Under *Worcester v. Georgia*, 31 U.S. 515 (1832), and subsequent cases, the answer is also no; state law applies on Indian reservations only through express federal delegation. Principles such as those found in *Talton v. Mayes* and the Marshall Trilogy are starting points in a distinct

body of law which involves a substantial geographic area in the State of Arizona, large commercial enterprises which operate off and on Indian reservations, and increasing partnerships and relations between federal, tribal and state governments and private entities.

Sadly, most attorneys in Arizona are unaware of these critical distinctions. In my current position at the Gila River Indian Community, I answer telephone inquires every month regarding the validity of Arizona state court orders. I also respond in writing to subpoenas and other similar requests, mostly from Arizona attorneys, explaining the necessity of requesting relief or domesticating orders in the Community's court. Almost without exception, Arizona attorneys erroneously believe a state court subpoena is valid if served on an Indian tribe and that state court orders may be immediately enforced on Indian reservations. It is clear to me that many Arizona attorneys lack a basic understanding of tribal sovereignty, the relationships between federal, state and tribal governments, and knowledge of tribal law.

The Committee on Examinations continues to be the only entity opposed to including Indian law as an examination subject. My review of Ms. Boulet's letters on the prior petition discerns three reasons why this important change was and is opposed: First, most other states do not examine on Indian law; second, the subject is too "sophisticated and complex;" and, third, the subject is not a required course at any law school. I would like to address this reasoning, as I believe all three arguments lack merit. As you are aware, New Mexico, Washington and South Dakota have made this change. Not surprisingly, those states—like Arizona—have large Native American populations and Indian reservations. Had the March 2006 Survey chart been captioned "Testing on Oil and Gas Law," I expect it would have looked similar, although the two states testing would be Texas (<http://www.ble.state.tx.us/Rules/NewRules/appendixA.htm>) and Wyoming (<http://www.wyomingbar.org/admissions/index.html>), both of which have substantial oil and gas industries.

I guess the primary question is how much the Supreme Court believes an attorney should *minimally* know about Indian law when they are licensed to practice law, given the dramatically different legal principles involved and that Arizona has 22 federally-recognized Indian tribes and Indian reservations comprising 28% of the state. From my experience, it is far more probable that an Arizona attorney will encounter an Indian law issue in his or her career than a Texas or Wyoming attorney will face an oil and gas issue (because Indian law issues appear in civil *and* criminal cases). However, Texas and Wyoming have deemed those issues significant enough in their states to merit examination.

The second and third arguments against including Indian law are far from unique. While portions of Indian law are sophisticated and complex, they are grounded in legal concepts which are simple and basic, such as tribal sovereignty, and federal statutes which are straightforward (such as the Indian Civil Rights Act of 1968 or the Indian Child Welfare Act of 1978). The same argument could be easily applied to any of the other subjects tested on the examination; all are potentially complex subjects, grounded

in basic principles. From the standpoint of an examination, the level of complexity is generally a function of how a question is drafted, rather than the subject matter tested. While Indian law is not a required course at any law school, it is offered at *every* law school in Arizona and New Mexico. Likewise, commercial law, business entities, criminal procedure and family law are not required courses at most law schools, but often tested on state essay examinations (including Arizona). That every law school in Arizona offers a course in Indian law on a regular basis, though not required, seems to me to be a compelling reason in *favor* of the Petition.

As a final point, I would add that, prior to practicing law, I was a college professor for seven years, including stints at the University of Nevada, Las Vegas and Miami University of Ohio. Among other subjects, I taught courses in argumentation and debate and coached nationally competitive intercollegiate debate teams. Through this experience, I learned much about the development and maintenance of critical thinking skills. Indian law is a subject which, in my opinion, requires the kind of critical thinking we should demand of all attorneys. It is not a subject where success in examination depends solely upon memorization, but on the application of basic principles to a specific set of facts.

I thank the Supreme Court for the opportunity to express my opinions, and I encourage the Supreme Court to grant the State Bar's Petition, and include Indian law as a subject on the Arizona examination.

Very truly yours,

s/ Thomas L. Murphy

Thomas L. Murphy